

RULE 17 — GUILTY PLEAS — Defendant must know general amount of restitution to make plea voluntary — Revised 11/2009

Generally, a defendant must be aware of the consequences of a guilty plea to make the guilty plea voluntary. In *State v. Crowder*, 155 Ariz. 477, 747 P.2d 1176 (1987), the Arizona Supreme Court addressed the question whether a defendant's plea was involuntary if he was not aware of the amount of restitution he would be ordered to pay when he entered the plea. In *Crowder*, the defendant pleaded guilty to first-degree murder and other charges in return for the State's agreement to dismiss other charges and not to seek the death penalty. The plea agreement recited that the court would order the defendant to pay restitution for the surviving victim's economic loss under A.R.S. § 13-603(C) (If a person is convicted of an offense, the court shall require the convicted person to make restitution to the person who is the victim of the crime or to the immediate family of the victim if the victim has died, in the full amount of the economic loss as determined by the court . . .), but mentioned no figure. The probation officer's report stated only that the surviving victim's loss was "approximately \$37,000."

The court ordered the defendant to pay \$37,000 in restitution and the defendant sought to withdraw from his plea. Citing *State v. Phillips*, 152 Ariz. 533, 733 P.2d 1116 (1987), he argued that "his guilty plea was not intelligently made because he was not advised how much restitution he would have to pay." *Crowder*, 155 Ariz. at 478, 747 P.2d at 1177. The Arizona Supreme Court noted that the record revealed nothing to show that the defendant understood before he pleaded guilty that he could be made to pay any particular amount, so the defendant's agreement to pay restitution was "involuntary because unknowingly made." *Id.* at 479, 747 P.2d at 1178. The Court

cautioned, however, that the defendant might well have been aware of the amount from other sources:

Of course, the word "record" is not limited to the formal record of the change of plea proceedings. When the defendant claims his plea was unknowing and therefore involuntary, the question is not simply what the defendant was told in court but what he knew from any source. Thus, for example, if defense counsel had learned from any source that the economic loss was in the range of \$30,000 to \$40,000 and had somehow informed defendant that restitution would be required in such an amount, the change of plea would have been knowing even though the same information was not imparted by the trial judge at the formal proceedings. *State v. Levario*, 118 Ariz. 426, 577 P.2d 712 (1978) (extended record must be examined with regard to defendant's knowledge of special sentencing conditions); *State v. Ellis*, 117 Ariz. 329, 572 P.2d 791 (1977) (dealing with nature of charge and range of possible sentence). Similarly, where defendant pleads to a crime which has statutorily prescribed monetary parameters, defendant would necessarily have reason to expect the amount of restitution to be within those parameters. See, e.g., A.R.S. § 13-1802(C); cf. *State v. Lukens*, 151 Ariz. 502, 729 P.2d 306 (1986).

State v. Crowder, 155 Ariz. 477, 479-80, 747 P.2d 1176, 1178-79 (1987). The Court rejected the State's argument that "defendant had adequate knowledge of his potential monetary liability because in both the plea agreement and the change of plea proceedings the maximum fine of \$150,000, plus thirty-seven percent surcharge per count, was expressly set forth." *Id.* at 480, 747 P.2d at 1179. The Court concluded that on the record, the "defendant's *agreement to pay restitution* was not voluntary because he had no prior knowledge of the amount." *Id.* [emphasis in original.]

The Court in *Crowder* then went on to consider "whether Crowder's lack of knowledge of the amount of restitution rendered the *entire* plea agreement involuntary." *Id.* [emphasis in original.] The *Crowder* Court found that, viewed in the context of the defendant's horrific crimes, the likelihood of the death penalty if he went to trial, and the overwhelming evidence against him, "the question of restitution for financial loss seems quite inconsequential to the decision-making process." *Id.* at 481, 747 P.2d at 1180.

Under all the circumstances, the Court found that, on the limited record available, it was "quite clear that the precise amount of restitution was irrelevant." *Id.* However, since the record was "very sketchy," the Arizona Supreme Court remanded the matter to the trial court for an evidentiary hearing to determine whether the defendant had knowledge of the amount of restitution, and, if not, whether that lack of knowledge was "a relevant and material factor in defendant's decision to plead." *Id.* at 482, 747 P.2d at 1181. If so, the trial court would have to vacate the entire plea and reinstate all the original charges. If not, "Defendant agreed to pay restitution, but never validly agreed to the amount of \$37,000. Restitution is mandatory under A.R.S. § 13-603(C), however, and if the plea is to stand, he is entitled to an evidentiary hearing to determine the exact amount of restitution he must pay." *Id.*

Note that *Crowder* does not require an evidentiary hearing when the record before the court and/or the circumstances clearly establish that the amount of restitution was not a significant factor in a defendant's decision to plead guilty. In *State v. Grijalba*, 157 Ariz. 112, 755 P.2d 417 (1988), the defendant pleaded guilty to attempted burglary and was ordered to pay \$78 in restitution. He then sought to withdraw from his plea, arguing that under *Crowder, supra*, his plea was involuntary because he was not advised of the amount of restitution he would have to pay. The Arizona Supreme Court held that no evidentiary hearing was required to determine that the amount of restitution could not have been a relevant factor in the defendant's decision to plead guilty. The Court noted:

In the present case, the record establishes that the defendant was fully aware of the essential and relevant terms of the plea agreement and its material consequences to him, including the fact that he would have to make restitution in some amount and might be fined over \$150,000. The only thing

the defendant did not know was the amount of restitution he would have to pay for loss of property, since this had not been computed. Given the possible fate that awaited defendant, and the advantageous plea offered, can we conclude that the amount of restitution would not have been a relevant consideration in defendant's voluntary decision to accept the plea agreement?

. . . The present case is one in which we have no doubt that the amount of restitution in the sum of \$78.00 was not a material factor in defendant's voluntary decision to enter into the plea agreement. We hold that the plea agreement must be upheld.

State v. Grijalba, 157 Ariz. 112, 115, 755 P.2d 417, 420 (1988). See also *State v.*

Wideman, 165 Ariz. 364, 798 P.2d 1373 (App. 1990). In that case, the defendant was charged with first degree murder and other charges and pleaded guilty under an advantageous plea agreement. At the change of plea hearing the prosecutor roughly estimated the amount of restitution at \$17,000 but said that the defense might disagree with some of the claimed amounts. The defendant agreed to plead guilty and the trial court accepted the plea, finding that the defendant's plea was made knowingly, voluntarily, and intelligently. The trial court set the matter for an evidentiary hearing and eventually ordered the defendant to pay over \$29,000 in restitution. On appeal, the defendant sought to withdraw from his plea. The Court of Appeals found that by failing to object to the amount of restitution in the trial court, the defendant had waived his right to seek to withdraw from his plea on that ground on appeal. Nevertheless, the Court reduced the amount of the restitution order, finding that some of the victim's family's expenses were not compensable in restitution.

In addition, when a defendant pleads guilty to a charge of theft, for example, in which there is a statutorily prescribed monetary parameter, the defendant is on notice that he may have to pay restitution up to the highest limit set in the definition of the offense. In *State v. Lukens*, 151 Ariz. 502, 729 P.2d 306 (1986), the defendant pleaded

guilty to theft of property valued between \$100 and \$250. Her plea agreement stated that she would have to pay restitution, but stated no restitution cap. At sentencing the court ordered the defendant to pay over \$9,000 in restitution. The defendant contended that she should be allowed to withdraw from her plea because she did not agree to pay that much restitution. The Arizona Supreme Court agreed, holding that when the statute to which a defendant pleads guilty includes a monetary parameter imposed by statute, the defendant cannot be required to pay more than that amount "unless he voluntarily and intelligently agrees to pay a higher amount." *Id.* at 505, 729 P.2d at 309. The Court reasoned that such an agreement may be found when the plea agreement itself sets out a specific dollar amount of restitution; when the defendant agrees in court that he will pay a certain amount of restitution; or the defendant pleads guilty after the judge warns the defendant that restitution may be ordered up to a specific amount. "Only if one of these three statements are [*sic*] found in the record will we conclude that a defendant voluntarily and intelligently agreed to pay restitution in an amount exceeding statutorily-prescribed monetary parameters of the crime to which he pled guilty." *Id.*

State v. Weston, 155 Ariz. 247, 745 P.2d 994 (App. 1987). In *Weston*, the defendant pled guilty to criminal damage of \$100 or less and simple assault. The trial court ordered him to pay \$40.00 in restitution for the damage and \$6 for the victim's medical expenses. The defendant appealed, arguing that his plea was involuntary because the plea agreement did not indicate that he would pay restitution. Noting that restitution was mandatory, the Court of Appeals examined the record in an attempt to decide if the omission of restitution in the plea agreement constituted reversible error. The Court of Appeals found no error as to the criminal damage restitution, stating,

"Because the very charge supplied a range cap that enabled defendant to reasonably approximate the amount of restitution that his criminal damage plea entailed, we conclude that he entered a voluntary and intelligent guilty plea to that offense." *Id.* at 249, 745 P.2d at 996. While the assault offense lacked any "monetary parameters" and therefore lacked any definite restitution cap, the Court of Appeals found no error in the \$6 restitution order. The Court reasoned that \$6 was *de minimis* and "certainly no more than the defendant should reasonably have anticipated as a medical consequence of his assaultive conduct." *Id.*